In The

Supreme Court of the United States

October Term, 1978

No. 79-405

JOHN DeLYRA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To: The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court:

Petitioner, John DeLyra respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit made final

in this proceeding on August 10, 1979

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit rendered by HONORABLE Wilfred Feinberg, William H. Timbers, Circuit Judges and Jacob Mishler, Chief District Judge, on June 25, 1979 is reprinted herein (see Appendix, 3a-9a). A petition for rehearing was denied on August 10, 1979 by HONORABLE Irving R. Kaufman, Chief Judge, and is reprinted herein (see Appendix, 2a-3a).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 10, 1979.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Was the supervisory jurisdiction of this Supreme Court over the administration of criminal justice in the United States District Courts offended Constitutionally where a plea of guilty was entered by a physically sick, emotionally unstable 68-year-old man as a result of coercion by his own Counsel and his failure to comprehend the possibility of being sentenced to twenty years imprisonment upon that plea?

2. Was the petitioner denied fundamental Constitutional rights where the Attorney representing him at the hearing on his plea of guilty was unknown to him, was unfamiliar with the case, his possible technical and actual defenses - including a pronounced lack of intent to commit any crime - merely passively stood by his side, without counse-

ling or judgmental reference whatsoever?

3. Was the sick, emotionally unstable 68-year-old defendant denied fundamental Constitutional rights where he literally "pleaded away" his life to a possible 20-year sentence which his Counsel"obtained" for him without a semblance of "bargaining" or counter-offer being made on petitioner's behalf; and upon which the Judge actually sentenced him to ten years to be served concurrently on the two counts?

4. Was petitioner, at all material times herein in extreme pain because of known medical infirmities of a pronounced nature, denied fundamental Constitutional rights upon his plea of guilty to a possible twenty year sentence where the sentencing Court should have been aware that Counsel at the sentencing knew nothing of the case,

that petitioner was confused and virtually unaware of the import of the Judge's questioning nor of his own perfunctory answers thereto because of his promised "walking away" by his Counsel who had strenuously urged the plea to a possible twenty-year sentence to a sick, infirm 68-year-old man?

5. Was petitioner denied all his basic Constitutional safeguards where, ultimately, the Counsel who had accepted without any counter-offer a plea to a potential 20-year sentence, and two additional Counsel who represented him at critical junctures were each former Assistant United States Attorneys who had practiced in the Southern or the Eastern Districts of New York - and, in at least two of said cases petitioner was not told each of said Counsel was a former United States Assistant Attorney, and a friend or/classmate of the current AUSA prosecuting the defendant?

6. Was, effectively, "Legal Incest" committed here, depriving petitioner of basic rights to Due Process of the Law, Equal Protection of the Law, including the right not to commit self-incrimination, the right to cross-examine witnesses, the right to confront his accusers, the right to representation by Counsel pursuant to the Sixth Amendment and the right to trial by jury guaranteed by the Seventh Amendment?

7. Was the plea unconsionably obtained in a "sweetheart" deal by his own Counsel herein, and erroneously accepted by the Court, effectively a violation of the Eighth Amendment right to be free of cruel and unusual punishment?

8. Was the bail in the amount of One Hundred Thousand ($100,000.) Dollars so excessive as to be a denial of bail to petitioner as a matter of Constitutional Law?

STATUTES INVOLVED

This petition involved Rule 11 of the Federal Rules of Criminal Procedure, subsection (c)(1)(5), Rule 11, Federal Rules of Criminal Procedure, Bail Refort Act of 1966.

CONSTITUTIONAL ISSUES PRESENTED

Directly raised below were the protections afforded by the Fifth, the Sixth, the Eighth and the Fourteenth Amendments to the Constitution of the United States. It was alleged all these Amendments to the Constitution were subverted and petitioner DeLyra denied their efficacious, indispensible safeguards.

AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 8

Bail—Punishment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

The basic statement of the underlying facts herein is found in the Application for a Stay to the Supreme Court of the United States, found herein in Appendix "10a-19a", with the Denial of the Application by Justice Thurgood Marshall.

without opinion on March 15, 1979.

Subsequent to the facts therein recited, oral argument was had before the United States Court of Appeals for the Second Circuit;and the opinion denying petitioner the relief therein sought was rendered by a three-Judge Court, Honorable Wilfred Feinberg, William H. Timbers, Circuit Court Judges and Honorable Jacob Mishler, Chief District Court Judge,on June 25, 1979. That Court affirmed the ruling by Honorable Charles E. Stewart, J., refusing petitioner the right to withdraw his plea of guilt and have a trial on the merits with respect to the Indictment hereinbelow. Instructively, at oral argument, <u>for the first time</u> petitioner learned from the United States Attorney therein arguing for the Government that yet a fourth Attorney -

Attorney David Cutner - had been a present or former United States Prosecutor, now "defending" petitioner. Or working closely with the prosecutorial "buddy" still in the United States Attorney's Office, to wit: Eugene Kaplan, Esquire. Full reliance is herein placed on the Statement found in the cited "Application for a Stay" herein, supra.

REASONS FOR GRANTING THE WRIT

The writ sought herein should be granted for compelling reasons of Constitutional, statutory and ethical considerations of the most profound nature.

Point 1

FOUR FORMER OR PRESENT PROSECUTORS - THREE OF THEM AS DEFENSE COUNSEL - EFFECTIVELY DESTROYED ALL CONSTITUTIONAL PROTECTIONS AFFORDED PETITIONER; A FORM OF LEGAL INCEST PERVADED THE ENTIRE CASE RESULTING IN A POTENTIAL SENTENCE OF 20 YEARS ON A PLEA OF GUILTY BY A SICK, 68-YEAR-OLD DEFENDANT

18 U.S.C. sec.207, as amended October 26, 1978, effective July 1, 1979, evinces a strong public policy against former federal employees taking undue advantage by virtue of their former positions. It imposes criminal sanctions against those employees should they appear in any judicial proceeding within one year after leaving their government employment in a suit in which the United States is a party. The policy objectives, strived for in this statute, are clearly found in its legislative history. The restrictions on former federal employees are imposed to insure government efficiency, eliminate official corruption, and promote even-handed exercise of administrative discretion.

Officers should not be permitted to exercise undue influence over former colleagues.

This is a form of unfair advantage. Honest government, and decisions made in an impartial manner, are the objectives of this title. See U.S. Code, Congressional and Administrative News, vol.4, p. 4247(1978). Considerations in the case at bar are strikingly similar. LaRossa, the primary attorney retained by defendant DeLyra, was known to have been an Assistant United States Attorney. In turn, he retained Gold, the former AUSA who had worked with Kaplan, the current prosecutor in that same Southern District of New York office. Later, the plea of guilty was tendered by DeLyra. "Representing" his alleged interests was Cutner, yet a third former AUSA (albeit unknown to DeLyra until it was publicly announced by Kaplan at the Court of Appeals argument). Instructively, Gold "negotiated" the potential twenty year sentence. Cutner

stood by mutely and inertly while DeLyra "bargained away" his very life as a 68-year-old defendant on his plea. This blatant interweaving of roles is the very type of situation 18 U.S.C. seeks to prevent. Counsel herein were oblivious to the moral and ethical considerations inherent in their respective roles. There is an inherent conflict of interest present, amounting to nothing less than "legal incest." In striving for public confidence in the integrity of government, it is imperative to remember that what appears to be true is often as important as what is true. The relationship of the attorneys in the instant case, resulting in a plea-bargain (sic!) agreement of a possible twenty-year term for a sixty-eight-year-old defendant shocks the conscience. The integrity of the Judicial system is clearly

compromised when these presumed legal adversaries have so intertwined their respective roles that defense Counsel appears to have forgotten which side it represented!

It is axiomatic, except for "rare and conditional exceptions," Matter of Kelly, 23 N.Y.2d 368,376 (1968), that the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship. Eisemann v. Hazard, 218 N.Y. 155, 159; Matter of Tevlin, 250 App.Div. 685, 687-688; 7 C.J.S., Attorney and Client, sec. 47; Matter of Sociedad Maritima, 21 A.D.2d 43,45; cf. City Bank Farmers Trust Co. v. Cannon, 291 N.Y. 125,132. At the very least, the lawyer must disclose to all affected parties the nature and extent of the conflict and

obtain their consent to the continued representation. Moller v. Pickard, 232 N.Y. 271,274; Canons of Professional Ethics, canon 6; 7 C.J.S., Attorney and Client, sec. 47, pp. 826-827, sec. 125, pp.958-959; Ann. Attorneys - Conflicting interests, 17 AlR 3rd 835,838-841. Such was not done herein. The vice of non-disclosure is frightening in a case such as this one. A potential 20-year plea of guilt is entered upon advice of Counsel (Gold), virtual total silence is maintained at the sentencing thereon of ten years to be served concurrently (Cutner), LaRossa is above the battle and Kaplan, quo prosecutor and friend and confidante of at least two of the three former prosecutors, enjoys the benefits of this 68-year-old, sickly, trusting defendant virtually pleading away his life behind bars on the advice of counsel!

Lawyers for the defense and the distin-

guished Courts below have clearly neglected the admonition of a lawyer's duty to his client being that of a fiduciary or trustee. Hafter v. Farkas, 498 F.2d 587,589 (2d Cir. 1974); Spector v. Mermelstein, 361 F.Supp. 30,38 (S.D.N.Y.1972), mod.on oth.grds., 485 F.2d 474 (2dCir.1973); Wise, Legal Ethics 256 (2d ed.). See, also, Ethical Considerations 5-1 and 5-14 of the American Bar Association's Code of Professional Responsibility. That provides that the professional judgment of a lawyer must be exercised solely for the benefit of his client, see, e.g., Cinema 5,Ltd. v. Cinerama,Inc.,528 F.2d 1384 (2dCir.1976), free of compromising influences and loyalties. That Code has been adopted by the New York State Bar Association, Id., at p.1386. Its canons are recognized by both Federal

and State Courts as appropriate guidelines for the professional conduct of New York lawyers. Hull v. Celanese Corp., 513 F.2d 568,571 (2d Cir.1975),n.12. Canon 9 of the Code of Professional Responsibility for attorneys provides that:

> "A lawyer should avoid even the appearance of professional impropriety."

Instructively, it is settled law that "all members of a partnership are barred from participating in a case from which one partner is disqualified." Laskey Bros. of W.Va. Inc. v Warner Bros. Pictures,224 F.2d 824, 826 (2d Cir.1955).

Here, the conduct of the defendant's attorneys offended a principle that has been burgeoning throughout recent years. Instructively, on information and belief, there never was the required full disclosure to John DeLyra by his Counsel Gold or his Counsel Cutner of

each Attorney's earlier relationship with the prosecutor Kaplan and that Office in the Southern District of New York. See, e.g., Greene v. Greene, 47 N.Y.2d 447 (June 1979) and Meinhard v. Salmon, 249 N.Y. 458 (1928), each leading cases holding that the legally incestuous nature of the representation herein presents a conflict of interest and creates the unavoidable appearance of impropriety, which mandates reversal of the guilty plea and the right to a full Habeas Corpus disposition to the Indictment herein. Rotante v. Lawrence Hospital, 46 AD2d 199; Cardinale v Golinello, 43 N.Y.2d 288. There is no discernable warrent herein for creation of a double standard of ethical behavior for former prosecutors, now defense counsel. See, also, Hatch v. Fogerty, 40 How.Pr. 492, 503; Sheffield v. State Bar of California, 22 Cal. 2d 627; Galbraith v State Bar, 218 Cal.329.

Point 11

BECAUSE OF JOHN DeLYRA'S ADVANCED YEARS THE HARSHNESS OF ACCEPTING A PLEA TO A POTENTIAL TWENTY YEAR SENTENCE - AND IN FACT IMPOSITION OF TEN YEARS CONCURRENTLY - IS VIOLATIVE OF THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND INHUMAN PUNISHMENT

Petitioner DeLyra has been subjected to cruel and inhuman punishment in violation of the Eighth Amendment (O'Neill v. Vermont, 144 U.S. 323,399 et seq.). The memorable dissent of Field, J., upon the basis of the prolonged sentence inflicted upon that appellant for violation of the State's liquor law, furnishes an a priori precedent for the reversal of petitioner's sentence. That epochal disagreement with the majority furnished the impetus for the modernization of the guarantee in question in Weems v. United States, 217 U.S. 349 (1910).

There is an additional occasion for the application of the guarantee. Apart from Constitutional limitations, the sentence imposed upon John DeLyra offends the supervisory jurisdiction of the Supreme Court over the administration of criminal justice in the District Courts. McNabb v. United States, 318 U.S. 332 (1943). That authority of this Court implies the duty of establishing and maintaining civilized standards of procedure and evidence. Maestas v. United States, 341 F.2d 493 (10 Cir.1965), ignored the genesis of that doctrine in McNabb, supra. The disregard for civilized standards in the instant prosecution further violates the rule that the permissible orbit of governmental power must be adjudicated in accordance with the scope of its exercise (Panama Refining Co. v. United States, 293 U.S. 388,420 et seq.(1934)).

Where the specific limitations of the Eighth Amendment are concerned, that measure of competence is reenforced by the elementary rule of broad construction. United States v. Lefkowitz, 285 U.S. 465,478(1932). Insofar as the plea entered herein is concerned, the defendant-petitioner has been deprived, in the first instance, of his guaranteed right of cross-examination. Greene v. McElroy, 360 U.S. 474, 496-501 (1959). The Federal and State statutes are also applicable by analogy. Steinberg v. Steinberg, 18 N.Y.2d 492,497 (1966) and cases cited therein. See, also, Travelers Insurance Co. v. Pomerantz, 246 N.Y.63,69 (1927), following inter alia, Kirby v. Tallmage, 160 U.S. 379,383; Dowling v. Hastings, 211 U.S. 199,202 (1914).

Petitioner is entitled to reversal under

the Eighth Amendment, the supervisory jurisdiction of the Supreme Court and, by analogy, to the principles of statutory and common law construction.

Instructively, because of petitioner's age the sentence herein was tantamount to a death sentence. This is especially germane in view of his serious medical problems. It should not be forgotten, this was no crime of violence to which this [illegible] sickly, emotionally distured old man had pleaded guilty to. See, Trop v. Dulles, 356 U.S. 86,100-101.

Point III

DEFENDANT-PETITIONER'S LACK OF COMPETENCY SHOULD HAVE BEEN APPARENT TO THE COURT; THEREUPON THE COURT SHOULD HAVE BEEN MORE ZEALOUS IN PROTECTING HIS RIGHTS AS A MATTER OF LAW AND AS A MATTER OF JUSTICE

The leading New York case of Wurster v. Armfield, 175 N.Y. 256,262 (1903), as cited in Barone v. Cox, 51 AD2d 115, at p. 118, set forth the correct rule to have been followed:

> "Incompetent persons become the wards of the Court, upon which a duty devolves of protection both as to their persons and property. This duty is not limited to cases only in which a committee has been appointed, but it extends to all cases where the fact of incompetency exists." (Wurster v. Armfield, 175 NY 256,262; Prude v. County of Erie, 47 AD2d 111, 113). "There is a duty on the courts to protect such litigants." (Sengstack v. Sengstack, 4 NY2d 502,509; and see Matter of Lugo, 3 AD2d 877, affd. 7 N.Y. 2d 939; Prude v. County of Erie, supra).

The Sixth Amendment requires that a defendant "be informed of the nature and cause of the accusation..." In the present case, there is a serious question whether the District Court communicated with the petitioner so that he understood the nature of the accusation. Appropos of that, petitioner on an appeal does not have to establish that he did not understand the nature of the accusation, and that he was prejudiced. This is because the Government has the clear requirement to show that the District Court established petitioner's personal understanding and compre-

hension of the charges. That burden cannot be shifted without depriving petitioner of his liberty without due process, contrary to the requirements of the Fifth Amendment.

Fundamentally, the record shows the petitioner had been advised of the consequences of his plea - not the nature of the charges.

Rule 11 of the Federal Rules of Criminal Procedure provides:

> "The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." (Italicized language added by Amendment of July 1, 1967)

Surely the fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the Federal Courts! Instructively, Rule 11 must be followed whether the defendant is represented by retained

counsel, United States v. Davis, 212 F.2d 264 (7Cir.1954), or represented by Court-appointed counsel, Kadwell v. United States, 353 F.2d ___ (9Cir.1965). See, Halliday v. United States, 380 F.2d 270 (1Cir.1967), p. 272, where the incisive Court rule was enunciated:

> "We may concede that there was nothing to indicate that the defendant was not acting voluntarily and with full understanding. This did not satisfy the rule. The rule imposes a burden of inquiry. Julian v. United States, 6 Cir.1956. 236 F.2d 155. Although the circumstances suggested no negative finding, they did not warrant an affirmative one."

Point IV

FUNDAMENTAL PREDICATE FOR THE BAIL REFORM ACT HAS NOT BEEN HONORED HEREIN, CAUSING A CONSTITUTIONAL LACUNA IN THE PETITIONER'S RIGHTS IN THE PREMISES

This Court's landmark enunciation in Stack v. Boyle, 342 U.S. 1 (1951), where the Court spoke of the Judge not being free to

"make the sky the limit" (p.6 of 342 U.S.) because the Eighth Amendment to the Constitution says: "Excessive bail shall not be required."

In the case at Bar, bail set at One Hundred Thousand ($100,000.) Dollars has reached "the sky". The spirit of the Bail Reform Act has thereby been truncated and despoiled.

Point V

RECENT LANDMARK RULINGS BY THIS COURT MANDATE THE PETITIONER BE PERMITTED TO WITHDRAW HIS COERCED AND INCOMPETENTLY-ENTERED PLEA OF GUILTY

It is respectfully submitted the law of the case hereinbelow was misapprehended, and that compelling Constitutional mandates call for reversal of this onerous plea of guilt. Equally compelling grounds exist for equitable relief.

Johnson v. Virginia, decided by this Court

on June 28, 1979 has elucidated the thrust of In re Winship, 397 U.S 358 (1970), in relation to the guarantee of due process of law. In a criminal case such as this one, it protects a defendant from conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

By parity of reason, since Gideon v. Wainwright, 372 U.S 335 (1963) has assimilated the right of representation with the fundamentals of due process, the imposition of sentence upon a conviction, emanating from a plea of guilty where counsel has not acted with the utmost good faith, is necessarily void.

In the light of the recent opinions of this Court, supra, and of the New York Court of Appeals, e.g., Greene v. Greene, supra., and

of the parallel evolution of the respective concepts of cruel and inhuman punishment and of due process, from the dissent of Field,J., in O'Neill v. Vermont, 144 U.S. 323, 362 et seq. (1892), Weems v. United States, 217 U.S. 349 (1910), and Estelle v. Gamble, 429 U.S. 97,102,103 (1976) and Ingraham v. Wright, 430 U.S. 651 (1977), in respect to the first guarantee, and of McCray v. United States, 195 U.S. 27, 61 (1904); Hough, J., Due Process of Law - To-Day, 32 Harv.L.Rev. 218,221 (1918); Gitlow v. New York, 268 U.S. 652 (1925); Warren, "The New Liberty Under the Fourteenth Amendment," 39 Harv.L.Rev.431,432 et seq. (1926). Palko v. Connecticut, 302 U.S. 319 (1937) and its progeny, in respect to the second, a rehearing en banc in the Court below should have been granted and the relief therein prayed for granted. This Court should

remedy that fundamental error.

Howard v. Fleming, 191 U.S. 126 (1903), wherein review was unsuccessfully sought of a ten-year conspiracy conviction for violation of state law, on the grounds of cruel and inhuman punishment, adumbrated the rationale of Jackson v. Virginia, supra. There the rights of petitioner, in contrast to those of Howard (cited in Ingraham v. Wright, 430 U.S., supra, 667) were adequately protected by counsel.

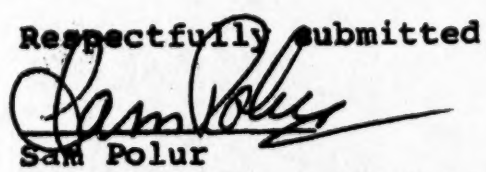
The Constitutional Amendments we are dealing with herein embrace "broad and idealistic concepts of dignity, civilized standards, humanity, and decency...", Jackson v. Bishop, 404 F.2d 571, 579 (CA8 1968). The Courts have consistently held repugnant to Constitutional guarantees any punishments which are incompatible with

"evolving standards of decency that mark the progress of a maturing society." See, e.g., Trop v. Dulles, supra, 356 U.S. 86, at 100-101.

Conclusion

Those standards are surely at issue herein where we are dealing with a sick man 68-years-of-age, trusting his lawyers, who plead him guilty to a potential twenty years imprisonment - with ten years concurrently the actual sentence -. The record shows three former United States Assistant Attorneys clearly colluded with the current Assistant United States Attorney to "put away their own client." Clearly, petitioner John DeLyra did not responsibly, knowlingly plead away his very life! This Court should grant the petition to withdraw the plea of guilty herein, duly order Habeas Corpus relief, and grant all other further and different relief as may be deemed just and appropriate in the premises.

Respectfully submitted,



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New York, N.Y. 10005.

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS OF THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of August, one thousand nine hundred and seventy-nine.

Present: HON: WILFRED FEINBERG,
HON. WILLIAM H. TIMBERS,
Circuit Judges
HON. JACOB MISHLER,
District Court Judge
(Chief Judge)

Docket 79-1138
79-2045

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN DeLYRA,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant, John DeLyra

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED. A Daniel Fusaro, Clerk.

Opinion of the Court

UNITED STATES COURT OF APPEALS : SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in theCity of New York, on the tenth day of August, one thousand nine hundred and seventy-nine.

79-1138

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN DeLYRA, Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, John DeLyra, and no active judge or judge who was a member of the panel having requested that a vote be taken

Opinion of the Court

on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/
IRVING R. KAUFMAN, Chief Judge

OPINION OF THE UNITED STATES COURT OF APPEALS OF THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of June, one thousand nine hundred and seventy-nine.

Present:

HONORABLE WILFRED FEINBERG

HONORABLE WILLIAM H. TIMBERS
Circuit Judges

HONORABLE JACOB MISHLER
Chief District Judge

79-1138
79-2065

UNITED STATES OF AMERICA,
Appellee,
-against-

Opinion of the Court

JOHN DeLYRA,)
)
Defendant-Appellant.)
)

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are AFFIRMED.

These are consolidated appeals from an order denying habeas corpus and from a judgment of conviction entered on appellant's guilty plea to two fraud counts in satisfaction of an indictment of over ninety counts, which charged numerous violations of federal laws prohibiting mail fraud, wire fraud, travel fraud, transportation fraud and aiding and abetting such frauds, 18 U.S.C. secs. 1341, 1343, 2314, 2, with violating the

Opinion of the Court

federal anti-racketeering statute, 18 U.S.C. sec.1962, and with conspiracy in violation of 18 U.S.C. sec. 371. Judge Stewart of the United States District Court for the Southern District of New York, who entered the order and judgment appealed from, sentenced appellant to two concurrent terms of ten years imprisonment and a total of $20,000. in fines.

On the appeal from the judgment of conviction, appellant first argues that the ten year concurrent sentences violate the Eighth Amendment's proscription on cruel and unusual punishments. Considering appellant's prior criminal record and his leading role in the frauds charged in the indictment, there is nothing unusual about appellant's sentence, which was well within statutory limits.

Appellant also argues that his guilty plea is invalid since he was represented by

lawyers who were former Assistant United States Attorneys in the Southern District of New York in the plea negotiations with that district's United States Attorney's office. He claims that their representation of him was unethical. We do not find anything unethical about the representation here. Moreover, it does not appear that appellant was in any way disadvantaged by the representation he received from such people so knowledgeable about his prosecutorial opponents. In fact, the plea bargain, even with its potential exposure of 20 years imprisonment, was quite favorable to appellant considering his former record and the number and nature of charges dismissed, including the racketeering count.

As for the appeal from the order denying habeas corpus, putting to one side any question of prematurity in the district court

(the petition was brought prior to sentencing), all of appellant's claims are without merit. Appellant argues that he did not understand the nature of the charges against him when he pleaded guilty due to mental infirmity brought on by back pain. But Judge Stewart specifically asked about appellant's health during the allocation, and appellant indicated nothing wrong. Further, a reading of the allocution shows that appellant was totally lucid during the entire proceedings. Considering appellant's prior experience with the criminal justice system for a similar fraudulent scheme, see United States v. Crisona, 416 F.2d 107 (2dCir. 1969), and Judge Stewart's opportunity to observe him over a period of months, we see no reason for reversal in appellant's conclusory assertion that he did not understand the

charges against him.

Appellant contends that he was promised by both his own attorneys and the prosecution that if he pleaded guilty he would never go to jail. Apart from the fact that the written plea agreement makes no such promise, and that appellant acknowledged his potential exposure to imprisonment at the allocution, Judge Stewart found, after an evidentiary hearing, that no such promise was made to appellant. That finding is not clearly erroneous.

Appellant claims that a factual basis for the plea of guilt was never established in that he never admitted the intent needed to sustain a conviction for fraud. But a reading of the Rule 11 allocution reveals the frivolousness of that contention. He specifically admitted knowing that the bogus

investment house he was running did not have the stock he represented it had to its customers, which was the very basis of the fraud charges.

Appellant also contends that the District Court erroneously fixed his bail at $100,000. On April 24, 1979, this court denied appellant's motion for a reduction of bail. We see no reason to rule otherwise in light of Judge Stewart's finding that there is a risk that appellant would become a fugitive and that there was a danger to the community in appellant's propensity to perpetrate frauds.

We affirm the order of the district court denying habeas corpus and the judgment of conviction.

s/
WILFRED FEINBERG

s/
WILLIAM H. TIMBERS

s/
JACOB MISHLER

APPLICATION FOR A STAY TO THE SUPREME COURT OF THE UNITED STATES

JOHN DeLYRA, Appellant-Petitioner,	:	No.79-1088 (79-1029)
vs.	:	
UNITED STATES OF AMERICA, Appellee-Respondent.	:	

Now comes the Appellant, by his attorney, and pursuant to 28 U.S.C., sec. 1651(a) and Revised Rules 50 and 51 of this Court, applies for a stay of the sentence due to be had on March 15, 1979 at 9:30 A.M. at the United States District Court for the Southern District of New York, Honorable Charles E. Stewart, J., presiding, which petition for a stay of sentence was duly denied without opinion on March 12, 1979 by the Court of Appeals by the two members present, and thereafter on March 13, 1979 the District Court aforesaid refused to stay pending an appeal by petitioner from

that denial, and set the sentencing date as aforesaid for 9:30 A.M. on March 15, 1979; and in support of this application shows:

1. Petitioner was arrested for alleged stock frauds perpetrated with others named in the subsequent indictment issued from the Grand Jury sitting in the United States District Court for the Southern District of New York as 78 CR. 361. Subsequently, he pleaded guilty to two counts thereof to satisfy the entire Indictment, pursuant to a "deal" allegedly made by his attorney, one Gold, with the Assistant United States Attorney prosecuting the action, one Kaplan. That "plea bargain" was made for a potential sentence of twenty years to a man then 68 years of age, emotionally unstable, who had retained some five or six

attorneys theretofore. His counsel of record was one LaRossa, for whom Mr. Gold was then employed.

2. The record shows that Gold was an upper-classman in Law School which was then attended by Kaplan, and the two men knew each other. Thereafter Kaplan was joined by Gold for some 18 months in the Office of the United States Attorney for the Southern District of New York; Kaplan remaining as an AUSA and Gold entering private practice with the aforesaid LaRossa, also a former AUSA. It is clear that Kaplan offered the potentially devastating plea of twenty years potential imprisonment to the defendant through Gold and that no counter-offer was ever made, with the said unconscionable plea accepted by DeLyra upon the recommendation of Gold. DeLyra at all material times there-

after contended the said plea was coerced, he was tricked into accepting same, that he was too sick physically and mentally to knowingly have accepted same and that promises to suspend sentence or have Mr. DeLyra placed on probation were to be unfulfilled, as he subsequently learned. But that legally-incestuous "plea bargain" in violence to fundamental fairness and right ness and the inalienable dictates of Due Process of Law and Equal Protection of the Law pursuant to Constitutional mandates, remains as a potentially terrifying possibility, leading to a lifetime behind bars for your petitioner.

3. Petitioner further contends that the said Assistant United States Attorney Kaplan had promised him: "You are not going to serve any time" as one of the procuring factors for

his not rejecting the plea "bargain" aforesaid as proferred to him by his then Attorney, Gold, all of which he now and at all material times hereinafter recited knows to be untrue.

4. Petitioner further alleges a second Attorney representing him at the formal acceptance of the said plea on April 28, 1978, to the said Indictment returned May 19, 1978, one Cutner, only appeared at the said formal acceptance of his said plea; that said attorney was unfamiliar with the case, the possible technical defenses and actual defenses thereto, the fact that petitioner was not guilty as a matter of law in that the requisite intent and mens rea was lacking (Exhibit "1", Petitioner's Affidavit submitted to the Courts below), that the

young man who was the mastermind of the scheme allegedly "took" petitioner as well as other alleged victims - and that said Attorney Cutner merely passively, without independent Counseling or Judgment, had petitioner tender pleas to two counts of the said Indictment which were coerced and clearly not valid as a matter of law in view of the petitioner's then incompetence, not judicially found, yet apparent as a matter of law.

5. That petitioner - an elderly, sick man of 68 was permitted to, by his said Counsel for the plea acceptance solely, and through alleged fear induced by the alleged trickery of the said United States Assistant Attorney - without a semblance of logic, literally "pleaded away his life"through the possibility of being sentenced up to twenty

years in prison - a literal lifetime in view of his said age.

6. That the ensuing plea of guilty was made by petitioner and accepted by the District Court in violation of the object of Rule 11 of the Federal Rules of Criminal Procedure in that at all times material to this prosecution and petitioner's efforts to obtain the relief therefrom, petitioner has been and is emotionally unstable and suffers from a mental incompetence which does not enable him to defend himself or to effectively assist his counsel. (See, Psychiatric evaluation, Exhibit "2").Petitioner's instability arises from, and exists because of his then physical suffering of an incessant nature due to the curvature in his spine of scoliosisa lateral nature, subsequently added to by the morbid fear he has of going

blind due to an after-incurred automobile accident. Petitioner not only has suffered physically due to the aforesaid curvature of his spine, which has caused him unrelieved suffering, but he has also encountered unsurmountable difficulties in appropriately and effectively, as a matter of law, assisting the five or six attorneys who have, at best, been able to interpose varied, disjunctive defensive moves for him - erratically successful - in this critical matter, as petitioner has tearfully stated.

7. Petitioner respectfully submits that, unless the Stay herein sought issues as prayed for herein, he will be deprived of due process and of his Day in Court in compliance with that guarantee provided by the Fifth Amendment, of the right to representa-

tion by counsel and to confront and to cross-examine the witnesses against him pursuant to the Sixth Amendment and of the right to trial by jury protected by the Seventh Amendment.

8. That unless the Stay as prayed for be granted and petitioner be allowed to withdraw his plea of guilt aforesaid, due to the failure of Counsel to protect his rights in the premises, failure of the Court to recognize his obvious incompetence, although not judicially found, as a matter of law and as a matter of fact, the impaired and rapidly accelerating further impairment of petitioner's physical and mental health, all in violation of Rule 11 of the Federal Rules of Criminal Procedure - irretrievable rights will be sacrificed in violation of the

Constitution and Federal Statutes.

9. Clearly, the balance of equities further favors a stay. In granting or withholding equitable relief, whether in criminal or civil procedures, the courts are sensitive to the public interest and to the inherent rights pursuant to the Constitution. Virginian Railway Co. v. System Federation No. 40, 57 S.Ct. 592, 601, 300 U.S. 515, 552, 81 L.Ed. 789; Yakus v. United States, 64 S.Ct. 660, 674, 321 U.S. 414, 440, 88 L.Ed. 834. It is most respectfully urged the Stay be granted and this Court grant all other further and different relief it deems appropriate in the premises.

Respectfully submitted,
s/
Sam Polur
Attorney for Petitioner

114 Liberty Street, Room 204
New York, New York, 10007
March 14, 1979

Certificate of Service

Sam Polur, Esq., etc. ... this 14th day of March, 1979.

s/
Sam Polur

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 16, 1979

Sam Polur, Esquire
114 Liberty Street, Room 204
New York, New York 10007

Re: John DeLyra v. United States
A-805

Dear Mr. Polur:

Your application for stay in the above-entitled case has been presented to Mr. Justice Marshall, who has endorsed thereon the following:

"Application - denied
Thurgood Marshall
3/15/79"

Very truly yours,

MICHAEL RODAK, JR., Clerk

By
s/
Francis J. Lorson
Deputy Clerk

th

cc. Hon. Wade H. McCree, Jr.
Solicitor General of the United States